

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER DAVID GARCIA,

Defendant and Appellant.

D055515

(Super. Ct. No. FVI701500)

APPEAL from a judgment of the Superior Court of San Bernardino, Eric M. Nakata, Judge. Affirmed.

Peter Garcia (Peter) was charged with murder after he shot his wife, Maria Garcia (Maria), during an argument in their bedroom. (Pen. Code, § 187.) At trial, the prosecutor argued the crime was premeditated first degree murder or second degree murder. Garcia admitted he shot his wife, but argued that he was guilty of voluntary manslaughter, and not murder. The jury found Peter guilty of second degree murder, and found true the allegation that he personally discharged a firearm causing great bodily

injury and death. (Pen. Code, § 12022.53, subd. (d).) The court imposed a 40-year sentence, consisting of 15 years to life for the murder and a consecutive 25 years to life for the gun enhancement.

On appeal, Peter contends the court erred in refusing to admit his videotaped interview with detectives that occurred about five to six hours after he killed Maria.¹ Peter also contends the court erred in failing to give a limiting instruction on evidence pertaining to an allegation he had molested his stepdaughter more than 25 years earlier. We find these contentions are without merit, and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Maria and Peter had been married for about 27 years, and had three children together. Each spouse also had several children from a previous marriage. Maria had four children, and Peter had five children. All of the children were adults at the time of the killing, ranging in age from about 21 to 44 years old.

At trial, much of the prosecution case was presented through the testimony of three of the adult children: Carmen (Maria's daughter), Helena (Peter's daughter), and Melissa (the daughter of Peter and Maria). Although their testimony conflicted in some respects, many of the conflicts are not relevant for purposes of the issues on appeal. We thus focus on the big picture in summarizing the facts. We note conflicts in the evidence

¹ The interview was actually recorded on a CD that contains an audio and video recording of the interview. But to be consistent with the references below we shall refer to the recording as a videotape.

only where it is relevant to our resolution of this appeal. We shall discuss additional facts when relevant to a legal issue raised on appeal.

Peter was a truck driver for 28 years, but had retired. Maria owned a beauty salon with her daughter Carmen. During the weekdays, Maria worked with Carmen at the salon, and on weekends she worked as a nurse. She also provided support services for two of Peter's adult children. Peter was devoted to Maria, and his life in retirement centered on Maria's needs. He helped with maintenance and odd jobs at the salon. On the weekends he brought meals to Maria at her other jobs.

Although the children testified that the marriage was basically positive, they also acknowledged the marriage was not perfect. Maria controlled most aspects of the relationship, including financial matters, which sometimes created friction. Additionally, the couple engaged in frequent arguments, and, particularly in the early years of the marriage, there were some instances of physical violence.

The extended Garcia family also had numerous conflicts. For example, Maria transferred title of the family home and other assets to one of her daughters (Carmen) for financial planning purposes. Several other children disagreed with this transfer. Additionally, Peter and other family members were upset when they learned Carmen had used some of this money to pay for an attorney for one of Maria's sons, who had been accused of molesting the young daughter of one of Peter's daughters.

Then, in about February 2007, Elaine (Maria's 37-year-old daughter) told family members Peter had molested her when she was nine years old. Peter vigorously denied the accusation, and was ashamed and embarrassed that anyone would accuse him of this

crime. The family was split between those who believed Elaine and those who believed Peter. Maria initially sided with Elaine, but "went back and forth." Because of the accusation, Maria moved out of the house and began living with her daughter Carmen and Carmen's husband. But Maria continued to see Peter almost every day, when he would bring her food and help her in other ways. They would also sometimes see each other on weekends. Peter was very upset about Maria's decision to move out of the house and to believe Elaine.

Carmen testified that in early June 2007, Peter and Maria had an argument while they were at her house. Maria was angry that Peter had not obtained a receipt for a bill he had paid. Peter became visibly angry; his leg was quivering and he clenched his jaw. After Maria left the room, Peter expressed "intense anger," and said something like, "[s]he always does this." Peter then said "I know what I'm going to do . . . I'm just going to shoot her" When Carmen asked whether he would then shoot himself, Peter responded "No. I know what the Bible says. . . . I wouldn't do that. . . ." Peter then again referred to shooting Maria, stating "I don't care. I'll just throw the gun and then they can just take me away," and he made a motion as if he was being handcuffed.² Carmen told Maria about the threat but Maria did not seem overly concerned.

About one month later, on July 11, Maria accidentally fell at the beauty salon and broke her arm. Pursuant to Maria's request, Peter came to the hospital and spent the night

² Peter denied making these statements, and presented evidence that Carmen did not report this incident until shortly before she filed a civil lawsuit against her siblings and half-siblings pertaining to financial issues.

helping care for her. When she was discharged two days later, Maria told Peter she would go home with him. He was ecstatic. Peter told the children to go home and prepare the house for their mother's homecoming. He believed Maria intended to come home to stay, and that the abuse allegations were no longer an issue.

That night Peter and Maria slept in their bedroom. In the morning, Peter made breakfast and brought it to Maria in bed. Several of the adult children who were home also came into the bedroom and were sitting with Maria on her bed. The atmosphere was happy and festive. Suddenly, the phone rang and it was Elaine on the phone. Everyone left the room to give Maria privacy, except daughters Helena and Melissa. During the phone call, Elaine apparently expressed displeasure with Maria coming back to live with Peter, and Maria indicated that she "believed" Elaine, but she did not know what to do. After the phone call ended, Helena and Melissa asked their mother why she came home if she was going to believe Elaine. Maria then began yelling and started packing her clothes.

When Peter returned to the bedroom, he was surprised at the complete change in Maria's attitude. He appeared "angry," "sad," and "confused," and began pleading with Maria to listen to him. Maria shouted at him, and told him he needed to apologize to Elaine. Maria and Peter began arguing and yelling at each other. Helena and Melissa then left the room, and went to sit on a couch in the family room.

Helena heard her parents' conversation. She testified Peter was pleading with Maria to listen to him. Peter said "I love you so much. Why are you doing this to me?" Maria responded "I just want it to be over with. Just tell her you're sorry so we can go on

with our lives." Peter replied, "Maria, why do I apologize for something that I didn't do? You need to go to God and ask God if I ever did that, because I never did touch that whore, . . . I would never do such a thing." Suddenly, Helena heard Maria say "'Do it. Do it'" in a "cold" manner, and then heard Maria scream. Helena and Melissa then heard several shots in rapid succession.

Peter walked out of the room. According to Melissa, he was breathing hard, his entire body was shaking, and his eyes were big. He was waving the gun in his right hand and yelled, "'There. She's dead. The bitch is dead. Is that what everybody wanted?'" According to Daniel (Melissa's fiancé who was also at the house), Peter looked shocked, "like he was in another world." Daniel heard Peter say, "'I did it. I shot her,'" and "'It's all because of that fucking bitch Elaine.'" According to Helena, Peter appeared "gray and puzzled"; his "eyes were moving around . . ." and "bouncing back and forth."

Daniel went to the front door with his two-year-old child, but Peter called them back. Peter put the gun to his own head and cocked the hammer as he turned to go back into the bedroom. Daniel then took the gun away from Peter. Melissa called 911.

Sheriff's deputies arrived shortly after, and arrested Peter. Within a few minutes, paramedics pronounced Maria dead. Maria was shot in the abdomen, the left shoulder, and near the top of her head. The head wound was fatal.

About five or six hours after the shooting, Peter waived his *Miranda* rights and spoke at length with Detective Christopher Fischer at the sheriff's station. The interview was videotaped. During the interview Peter admitted he shot Maria. Although at various times Peter said he could not remember the shooting, he eventually talked about the

morning events, and gave reasons for his actions. He said he killed Maria because he "lost it" and was in a "rage" over her demands that he apologize to Elaine for the molestation. He explained at length how he was devastated by the molestation accusation and Maria's decision to believe Elaine, and that everything was "fine" and back to normal that morning, until Elaine called. When Maria raised the accusation again, he reached a "fit of hell," and grabbed his gun from the nightstand and shot Maria. He said he had first intended to shoot himself and initially held the gun to his head, but when Maria said "Do it, Do it," in a cold manner, he turned the gun on her.

Peter was subsequently charged with murder. (Pen. Code, § 187.)

Before trial, Peter requested permission to admit into evidence the videotape of his interview with Detective Fischer. The prosecutor objected on the basis that the interview was hearsay and not trustworthy. As discussed in more detail below, the court sustained these objections. But the court ruled that Peter would be permitted to call Detective Fischer as a witness to testify that the interview took place and to testify about Peter's demeanor during the interview.

The prosecution then presented its case (summarized above) in an attempt to prove Peter intentionally shot his wife and committed the crime with premeditation. In his defense case, Peter called Detective Fischer, who testified that he interviewed Peter about five hours after the shooting, and that during the interview Peter appeared "[a]t times" to be physically and emotionally shaken. He said Peter cried during the interview and presented a "variety of emotions."

Peter then testified on his own behalf. Because the content of Peter's trial testimony is important to evaluating Peter's appellate contentions, we set forth the testimony in some detail. During direct examination, Peter initially described the events leading to the shooting, which he said began with Elaine's molest accusations. The accusation made Peter feel "[b]ewildered," "empty," and "pretty bad." After Maria repeatedly asked Peter to apologize, Peter spoke with a psychiatrist and a priest, who told him there was no reason to apologize if he did not commit the alleged improper acts. After Maria moved out of the home, Peter continued to perform numerous odd jobs around Maria's salon and to bring Maria food. Peter said that during this period their relationship was "[r]ough" because Maria went back and forth with respect to how she treated him.

The night he went to visit Maria in the hospital, Maria was very happy to see him. They both cried and hugged each other. Maria told Peter she wanted to come home, and he felt like it was "sweet aroma." When they arrived at the home, they all had a "happy" dinner together. Maria and Peter then went to bed, and slept together for the first time in several months. When Maria awoke, she said she was hungry, and Peter quickly got out of bed, "put on [his] apron," and started making her coffee and breakfast. He then brought Maria the breakfast, and ate toast while she was eating. At that point, his mood was "[v]ery rich, very humble, very sincere, very sweet." Several of the adult children then came into the bedroom and sat on her bed. Peter was "[j]ust floating around," and "everybody [was] in a happy mood. . . ." Then Elaine telephoned and Peter left the room

immediately. He "didn't want to hear anything" so he "just took off and started doing things in the garage."

A short while later, Peter returned from the garage, and saw his daughter Melissa was crying and Maria was angry. He said he was "confused because one moment we were all happy . . . and all of a sudden over a phone call" everything changed. Maria again began asking him to apologize, and Peter responded "[a]pologize for what?" Peter kept asking "Why? Why? Why?"

When his counsel asked if he remembered going to get the gun, Peter responded that he did not remember getting the gun, but that he and Maria generally kept the gun in a nightstand next to the bed. When his counsel then asked whether he remembered what he did with the gun, Peter replied "We were arguing. That's all I remember. When it was over and done, I confessed to my daughters that I had shot their mom." Defense counsel then asked Peter whether he remembered putting the gun to his own head, and Peter replied: "I had put the gun to my head, and I did ask her if this is what she wanted. She was very angry at the moment and she said, yelled at me, to go for it, to do it." Peter explained: "It wasn't the sweet lady that I had just given breakfast to. It just tore me up and I thought it was all wrong. I thought everything was just no more. Just as quickly as everything happened that morning, the events that took place, that's how quickly everything happened I'm not denying that I [did it]. But that's the way that it happened. It wasn't planned." Peter said he recalled that when Maria told him "do it," he felt "bitter," and "[e]mpty." When asked if he remembered shooting his wife, Peter

answered, "I was so blinded by anger Never in my life have I ever experienced that. Ever." He said he loved his wife and missed her.

During cross-examination, Peter reiterated that he was angry at the time of the shooting. With respect to the gun, Peter said that although he did not remember where he got the gun that morning, he and Maria normally kept the gun in a nightstand next to Maria's side of the bed. Peter said that he kept the gun loaded for protection, and that he had owned the gun for 28 to 30 years but had never before fired it. At various times during the cross-examination, Peter said that he did not remember anything about the incident, including putting the gun to his head, and he said that his "kids" told him he put the gun to his head. However, he then contradicted these statements when he said he recalled he put the gun to his head when his "wife was yelling" at him to apologize.

On redirect, Peter again denied that he remembered the incident, the location of the gun, or talking to the detectives. But after his counsel showed him a copy of the interview transcript to refresh his recollection, Peter said he remembered he had told Detective Fischer that his intent was to kill himself. He said that he told the detective that he was going to blow himself up. He said when he was speaking with the detective he was attempting to be as truthful as he possibly could.

During closing argument, the prosecutor's theory was that Peter acted with premeditation and intentionally killed his wife because he was "tired of it all" and "just didn't want to deal" with the molest allegation anymore. In support, the prosecutor emphasized the evidence that (1) Peter refused to directly answer the question during cross-examination as to why he killed his wife; (2) Peter said "go to God" and "ask God"

just before the shooting; (3) Peter fired the weapon three times; (4) each bullet hit Maria in a critical area; (5) Peter walked to the nightstand to retrieve the gun, giving him time to reflect on his actions; (6) Peter's subsequent statements that he "killed the bitch" reflected that he had intended to kill her; and (7) Peter's statements in June 2007 to his stepdaughter Carmen showed his prior intention to kill Maria. The prosecutor argued that the crime did not constitute voluntary manslaughter because Maria's actions would not have provoked a reasonable person under the circumstances to act rashly and to shoot and kill.

In response, defense counsel argued that Peter was guilty only of voluntary manslaughter. He focused on the evidence showing Peter was feeling an "intense high" and "joy" by his wife's homecoming, and then suddenly the next morning she turned on him. Counsel said that during the argument Peter got the gun and pointed it towards his head: "And how do we know this? Well, he told you this. And we also know it because he told Detective Fischer this. He told Detective Fischer that it was his intention, how after this occurred when he went to get the gun, to blow himself up and kill himself, and when he put the gun to his own head his wife said, 'Just do it.'" Counsel also reminded the jurors that "[Peter] himself just hours after this occurred when he was interviewed by the police he told Detective Fischer what happened. I snapped. I lost it. He was acting rashly. His reasoning and judgment obscured. I think that's relatively clear."

The jury ultimately found Peter guilty of second degree murder, and found the Penal Code section 12022.53 gun enhancement true.

DISCUSSION

I. *Exclusion of Videotape of Interview with Detectives*

Garcia contends the court erred by prohibiting him from presenting the video recording of his interview with Detective Fischer.

As explained below, we conclude the court did not abuse its discretion in excluding the videotape. Moreover, based on our review of the entire record and our viewing the videotaped interview, there is no probability that the exclusion of the videotape prejudiced the defense case. The videotape contains Peter's explanation of the circumstances leading to the shooting of his wife, his recounting of his state of mind at the time of the shooting, and the asserted reasons he committed the crime. However, this evidence was fully presented to the jury at trial, and was essentially undisputed at trial.

A. *Trial Court Proceedings Regarding Videotape*

Before trial, Peter requested permission to show the videotape to the jurors during trial. Peter argued the tape was relevant to negate the malice aforethought element of the murder charge and/or to support that the crime was committed "in the heat of passion." In particular, Peter's counsel said that Peter's statements that he "'snapped'" and did not "'remember certain things'" were relevant to show what was "going on in his mind" when he shot his wife.

After the prosecutor objected on the basis that Peter's statements were hearsay, defense counsel argued that Peter's statements were admissible under the state-of-mind

hearsay exception set forth in Evidence Code section 1250.³ He also argued that "there are physical things that are present in the tape which . . . are important which cannot be recreated by my client testifying [such as] where my client . . . puts his head down and is crying" and expresses strong emotions about how much he loves his wife. The prosecutor countered that the tape was inadmissible under section 1250 because Peter's statements merely described his *prior* state of mind, and the statements did not meet the statutory trustworthiness requirement (§ 1252).

After watching the videotape, the court agreed with the prosecutor's arguments. The court explained: "I'm kind of glad that I did view the entire tape now. He is for the most part cool, calm, and collected. I was shocked. I thought given some of the statements that he made in [the transcript] that he was significantly showing more emotion while talking about it, and I was really surprised that he didn't. There are times, a couple of times, that he cried as defense counsel has noted, but for most part he's not. [¶] And I agree with the prosecutor that this is an attempt by Mr. Garcia to justify what he did. I don't buy that this shows his mental state or intent at the time of the incident at all, and I'm not going to allow it in. If the D.A. wants to bring it in, then I guess it will come in, but at this point I don't see any purpose in allowing that to happen." The court also rejected defense counsel's argument the videotape was admissible as reflecting prior consistent statements. The court found the contention was premature because Peter had not yet testified.

³ All further statutory references are to the Evidence Code.

After the prosecution presented its case and Peter had testified, defense counsel asked the court for permission to recall Detective Fischer to question him about Peter's statements during the interview. Defense counsel argued that Peter's statements during the interview were admissible as "prior consistent" or "prior inconsistent" statements. Noting that Peter did not answer many of the prosecutor's questions and frequently said he could not remember the events, the court ruled the statements were not admissible because they were hearsay, and "you're attempting to . . . get testimony in from the interview, which I've already excluded So I'm not going to let you do it."

B. Appellate Contentions

On appeal, Garcia contends the court abused its discretion in excluding the videotape because the statements in the recording were admissible: (1) under the "state of mind" exception to the hearsay rule (§ 1250); (2) as nonhearsay evidence relevant to his state of mind; (3) as nonassertive conduct; and (4) as consistent or inconsistent statements (§ 1236).

We examine these contentions under the deferential abuse of discretion standard. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question"]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Edwards* (1991) 54 Cal.3d 787, 819-820; *People v. Gatson* (1998) 60 Cal.App.4th 1020, 1024.)

1. *Admissibility under the State-of-Mind Exception to the Hearsay Rule*

During the videotaped interview, Peter made various statements about his intent at the time of the shooting. For example, he said he took the gun from the nightstand because he "snap[ped] and "lost it," and that his initial intent was "[t]o blow [himself] up." Peter also said that when he put the gun to his head and Maria said "[d]o it" in a cold voice, Maria's statement "blew me away" and then "I just pointed [the gun] at her [and shot her]."

Peter acknowledged that these statements were hearsay—out of court statements offered to prove the truth of the matter (that he intended to kill himself but suddenly snapped). But he argues these statements were admissible under the hearsay exception set forth in section 1250. Under section 1250, "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation . . . is not made inadmissible by the hearsay rule when: [¶] (1) the evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

We agree with the trial court that section 1250 is inapplicable because Peter's statements during the interview did not reflect his "*then existing* state of mind." (§ 1250, *italics added*.) Instead, Peter was relating his *prior* intent five hours earlier when he shot his wife. Section 1250, subdivision (b) specifically provides that "[t]his section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Peter argues his statements had "sufficient continuity" with the morning events to come within the "then existing" state of mind exception. Peter does not cite any supporting authority for this proposition, nor do the facts support this argument. Peter made the statements to the detectives in a completely different environment (a sheriff's station interview room) and after he had a substantial period to think about what had happened that morning. Peter did not make the statements at the time he was actually experiencing the state of mind he described—which is the essence of the reliability behind statements admissible under this exception. (See *People v. Whitt* (1990) 51 Cal.3d 620, 642-643.)

Moreover, even if Peter's statements could be construed as statements of his "then existing state of mind," hearsay statements are not admissible under section 1250 unless they are trustworthy. (§§ 1250, subd. (a), 1252; see *People v. Smith* (2003) 30 Cal.4th 581, 629; *People v. Edwards, supra*, 54 Cal.3d at pp. 819-820.) To establish a statement is trustworthy, the statements must have been "made in a natural manner, and not under circumstance of suspicion Such declarations are admissible only when they are "'made at a time when there was no motive to deceive.'" (*Edwards, supra*, at p. 820.) "A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion." (*Ibid.*, accord *People v. Guerra, supra*, 37 Cal.4th at p. 1113.)

The trial court viewed the videotape and found Peter's statements about his prior intent in shooting his wife were not trustworthy. The court's conclusion was reasonable and supported by the record. Peter had substantial time to consider the incident and to

think about how to minimize his culpability before talking with the law enforcement officers. While Peter may not have been knowledgeable on the precise distinction between first degree murder, second degree murder, and manslaughter, the trial court had a reasonable basis to find he would have understood that his culpability would be greater if he committed the act with premeditation and with the intent and desire to hurt his wife, versus a statement that he did not intend the murder but merely acted out of an uncontrolled emotion. As our high court has recognized, when a defendant is speaking with law enforcement officers in an effort to explain past actions, the statements are generally not considered trustworthy because the defendant frequently has a strong motive to alter the true facts to reduce his or her culpability. (See *People v. Edwards*, *supra*, 54 Cal.3d at p. 820; *People v. Whitt*, *supra*, 51 Cal.3d at p. 643; see also *People v. Cruz* (1968) 264 Cal.App.2d 350, 357.) Under the circumstances, the court did not abuse its discretion in finding the statements were not trustworthy under section 1250's state of mind hearsay exception.

Peter argues the trustworthiness requirement does not apply if the defendant testifies at trial. This argument is not a correct statement of law. (See § 1252; *People v. Smith*, *supra*, 30 Cal.4th at p. 629; *People v. Cruz*, *supra*, 264 Cal.App.2d at p. 358.) In support of this argument, Peter relies on *People v. Cudjo* (1993) 6 Cal.4th 585. *Cudjo* stands for the proposition that a court generally may not exclude hearsay evidence because it doubts the credibility of the *in-court witness* who is prepared to testify to the out-of-court hearsay statement. (*Id.* at p. 609.) In this case, the court did not refuse to admit the videotape on the basis that an in-court witness was not credible. Instead, the

court found Peter made the hearsay statements under circumstances showing a lack of trustworthiness at the time they were made. *Cudjo* is therefore inapplicable.

Peter alternatively argues his statements were admissible as evidence of a previously existing mental or physical state under section 1251.⁴ However, Peter waived this claim because he never raised it below. Further, this hearsay exception is inapplicable because it applies only when the "declarant is unavailable as a witness." (§ 1251, subd. (a).) Contrary to Peter's claims, the fact that he did not remember certain details when he testified does not show he was unavailable within the meaning of this code section. A failure to remember certain details is not comparable to the situation where a trial witness had a complete memory loss due to a "mental illness or infirmity." (See *People v. Alcala* (1992) 4 Cal.4th 742, 777-778.) Relying on *People v. One 1948 Chevrolet Conv. Coupe* (1955) 45 Cal.2d 613, 616, Peter suggests a showing of unavailability is not required. However, the California Supreme Court has since made clear that a showing of unavailability is a prerequisite to the section 1251 hearsay exception, and that a defendant may not create unavailability merely by choosing not to testify or choosing not to testify about certain matters. (*People v. Edwards, supra*, 54 Cal.3d at p. 819.)

⁴ Section 1251 provides: "Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation . . . at a time prior to the statement is not made inadmissible by the hearsay rule if: [¶] (a) The declarant is unavailable as a witness; and [¶] (b) the evidence is offered to prove such prior state of mind . . . when it is itself an issue in the action"

Further, as with the section 1250 hearsay exception, the section 1251 hearsay exception is subject to a showing that the statement was made under circumstances showing the statement was trustworthy. (§§ 1251, 1252.) As we have concluded, the trial court did not abuse its discretion in finding Peter's statements about his prior intent were untrustworthy.

We also reject Peter's argument that he had a constitutional right to present the videotape notwithstanding the fact that it was inadmissible hearsay and not trustworthy. Peter relies on *Crane v. Kentucky* (1986) 476 U.S. 683, in which the court determined the lower court erred in precluding the defendant from challenging the reliability of his confession by introducing testimony about the physical and psychological environment in which his confession had been obtained. (*Id.* at pp. 690-691.) The United States Supreme Court found the evidentiary ruling violated the defendant's right to "a meaningful opportunity to present a complete defense." (*Id.* at p. 690.) This case is different. Peter did not seek to attack admissions he made during the interview; instead his trial testimony was essentially consistent with his prior statements. Moreover, at trial, Peter had the opportunity to explain the circumstances of his prior interview. Unlike the *Crane* defendant, Peter had a full and meaningful opportunity to present his defense.

Finally, to the extent the court erred in not allowing Peter's prior statements of his state of mind to be admitted to the jury, the error was harmless under either the state or federal constitutional standard for assessing prejudice. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Peter gave the jury a full explanation of his state of mind during his testimony. This testimony was

consistent with his statements to Detective Fischer. The evidence was overwhelming at trial that Peter acted out of rage and uncontrolled anger when he shot his wife because she again demanded that he apologize for the molest. The critical issue for the jury's determination was whether a reasonable person would have been provoked to act out of rage under similar circumstances. (See *People v. Lee* (1999) 20 Cal.4th 47, 59 [to constitute voluntary manslaughter, "the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"].) If the court had admitted the videotape into evidence to show Peter's state of mind, there is no reasonable basis for finding the jury would have reached a different conclusion on this issue or any other disputed issue at trial.

2. Nonhearsay Evidence Relevant to Peter's State of Mind

Peter also argues the court erred in failing to admit the nonhearsay aspects of his postarrest interview.

An out-of-court statement that is not offered for the truth of the matter does not present a hearsay problem because the trier of fact may consider the evidence without needing to determine whether the facts contained in the statement are true or false. (See *People v. Turner* (1994) 8 Cal.4th 137, 189.) Peter argues that many of his statements on the videotape fall within this nonhearsay category. For example, he points to his statements about Elaine's accusation; the months of separation from his wife and how they treated each other; his statements about how happy he was that he and his wife slept together and that she "caressed him and treated him like a man"; and his statements about what they said to each other during their argument shortly before the shooting. Peter

argues these statements were nonhearsay statements relevant to prove his state of mind, and not the truth of the statements.

This argument fails because Peter's counsel never asserted this argument as a basis for the admission of the videotape. (See *People v. Smith*, *supra*, 30 Cal.4th at pp. 629-630 [contention "not cognizable on appeal because defendant did not present that theory of admissibility at trial"].) Although he mentioned the term "nonhearsay" during the hearing, counsel was focused on the section 1250 hearsay exception, and he did not tell the court that he wanted to introduce only the nonhearsay statements contained in the videotape, nor did he suggest there would be a practical way to show only those portions of the videotape reflecting the nonhearsay statements.

In any event, even if counsel had raised the nonhearsay issue as a basis for the admission of certain statements on the videotape, it is unlikely the court would have admitted the tape on this basis because the evidence was cumulative and had little or no probative value because it would have added nothing to the defense case. The defense evidence regarding the circumstances leading to the shooting was fully presented to the jury through the testimony of the adult children and Peter's testimony. This evidence was largely undisputed. The jury was aware of the accusation made against Peter; that he was extremely upset by the accusation; that Maria moved out of the house because of the accusation; Peter refused Maria's repeated requests that he apologize; Maria appeared to have dropped the issue when she decided to return home; the two slept in the same bed for the first time in months; Peter was ecstatic the morning and brought Maria breakfast in bed; and Peter was extremely shocked and upset in the minutes before the shooting

when Maria had again changed her mind and suddenly turned against him; and then the two engaged in a highly emotional argument, and Peter grabbed the weapon and shot his wife. Moreover, although the prosecution questioned whether Peter put the gun to his head before he shot his wife, the fact that Peter told Detective Fisher this version of the events was already before the jury through Peter's testimony. After his memory was refreshed by the transcript of the interview, Peter specifically stated that he told Detective Fischer that he had put the gun to his head.

Peter's videotaped statements were duplicative of the evidence at trial and would have added nothing of substance to the factual record. The primary factual issue for the jury's determination pertaining to the manslaughter determination was not what happened before or after the shooting (because those facts were largely undisputed), but whether these events would have caused an "ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." (*People v. Lee, supra*, 20 Cal.4th at p. 59.) There is no basis for finding the jury would have decided differently if they had viewed the portions of the videotape in which Peter described the circumstances leading to the shooting.

3. *Nonhearsay Demeanor Evidence*

Peter also argues that his demeanor on the video was admissible as nonassertive conduct. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1161-1162 [defendant's "nonverbal, nonassertive, emotional behavior . . . was not subject to the hearsay rule"]; *People v. Jurado* (2006) 38 Cal.4th 72, 129.) Peter contends he displayed "angst,"

"anger," and "frustration" during the interview and this was "highly probative evidence" of Peter's state of mind at the time of the killing.

This argument is unavailing. First, it is unclear whether the videotape would have proved these emotions at the time of the killing. The court made a specific factual finding that Peter's demeanor on the tape was "shock[ingly]" cool, calm, and collected. We agree that the video mostly showed Peter in control of his emotions. Although at the beginning of the interview Peter seemed very upset, once he composed himself, his manner was calm and deliberate. In any event, the jury heard Detective Fischer's testimony during which he acknowledged that Peter was emotional "[a]t times" during the interview. Moreover, even if Peter displayed "anger" or "frustration" during the interview, this demeanor did not necessarily reflect his emotions at the time of the killing because the interview occurred five hours after the shooting. Further, the evidence that Peter was angry, frustrated, and highly emotional at the time of the killing was essentially undisputed at trial.

On this record, the demeanor evidence on the videotape would have little probative value to prove Peter's earlier emotions, and there is no reasonable basis for finding the exclusion of the videotape to show Peter's demeanor would have affected the outcome of the trial.

4. Evidence of Consistent and/or Inconsistent Statements

Peter next argues the court erred in refusing to permit him to introduce certain statements made during the interview as prior *consistent* statements.

Generally, a prior statement that is consistent with trial testimony is inadmissible hearsay if offered to support the trial testimony. (§§ 791; 1236; see *People v. Cook* (2007) 40 Cal.4th 1334, 1357.) However, an exception to this rule applies if there has been a claim that a witness's trial testimony "is recently fabricated or is influenced by bias or other improper motive, and the [prior consistent] statement was made *before* the bias, motive for fabrication, or other improper motive is alleged to have arisen." (§791, subd. (b), italics added.) Under such circumstances, the prior consistent statement is relevant to establish that the current statement is truthful.

Peter contends this exception applies because the prosecutor suggested during closing arguments that Peter's assertions during cross-examination that he did not recall the details of the incident was influenced by his desire to deceive the jury as to the true facts. Peter maintains that his consistent statements during his interview that he also did not recall certain events was relevant to establish that he was not fabricating his failure to recall at trial.

The court did not abuse its discretion in rejecting this argument. First, when he was talking with Detective Fischer, Peter did recall many of the details of the shooting and related those details to the detective. Second, the asserted logic underlying the hearsay exception does not apply because Peter's motive to misrepresent the facts existed at the time of his interview with the detectives. (See *People v. Smith, supra*, 30 Cal.4th at pp. 629-630 [rejecting the defendant's claim that his postarrest interview statements were admissible as prior consistent statements because his motive to deceive existed at the

time of the conversations].) As in *Smith*, the prior consistent statements were made after the motive to deceive arose.

Moreover, any error in excluding the prior consistent statements was harmless. Peter argues his statements to Detective Fischer that he could not recall the shooting constituted "crucial evidence supporting his statement that he had acted in a blind rage" and that he acted "'from passion rather than from judgment.'" However, the evidence that he acted in a rage was already presented to the jury in numerous forms. It is not reasonably probable that the jury would have reached a conclusion more favorable to Peter on this issue if the jury had viewed the videotape for the purpose of learning that Peter told detectives that he could not remember certain details of the incident.

Peter alternatively argues that certain statements to the detectives should have been admitted as "prior inconsistent statements." Under section 1235, a prior inconsistent statement of a witness is admissible to impeach the witness and to prove the truth of the matters asserted therein. (*People v. Green* (1971) 3 Cal.3d 981, 985.)

Peter contends the court erred in refusing to permit him to introduce statements he made to Detective Fischer that he got the gun because he "lost it" and his intention was to shoot himself, and that Maria's statement that he should shoot himself "blew [him] away" and he then pointed the gun at her. He claims these statements were inconsistent with his trial testimony that he did not remember what happened before the shooting.

This argument is unavailing because Peter testified at trial consistent with these statements, and did not deny making the statements or deny the substance of the statements. For example, when he was asked at trial whether he remembered putting the

gun to his own head, Peter testified "I had put the gun to my head, and I did ask [Maria] if this is what she wanted. She was very angry at the moment and she said, yelled at me, to go for it, to do it." When asked if he remembered shooting his wife, Peter testified that the shooting "wasn't planned" and that "I was so blinded by anger Never in my life have I ever experienced that." Although at various points during the cross-examination, Peter said that he did not remember what happened before the killing, at other points he testified fully consistent with his statements to Detective Fischer. Thus, the court did not err in refusing to admit the statements under the prior-inconsistent-statement hearsay exception.

Peter also contends his statement to detectives that he remembered walking to the nightstand next to the bed and getting the gun from the nightstand was admissible under this exception because it was inconsistent with his statements during cross-examination that he did not remember the precise location of the gun.

Generally, the testimony of a witness that he or she does not remember a particular event is not inconsistent with a prior statement by the witness describing the event. (*People v. Green, supra*, 3 Cal.3d at p. 988.) An exception to this rule applies if there is a reasonable basis for concluding that the witness's failure to recall events is untruthful or the result of evasion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 711.) The rationale underlying this rule is that if there is a basis for finding the witness's trial testimony that he or she cannot recall the events untruthful, then prior statements that the witness did recall the events are admissible *to establish that the witness is now lying*.

This exception is inapplicable here. First, a defendant who states he cannot recall an event, and seeks to introduce his own prior statements is not seeking to introduce those statements to prove he is lying or to attack his or her credibility. Instead he is seeking to introduce those statements for the truth of the matter. Although prior inconsistent statements are admissible to prove their substance as well as to impeach the declarant (see *People v. Guerra, supra*, 37 Cal.4th at p. 1144), the statements are not admissible unless they are also being proffered by the defendant for impeachment purposes. Although a party may impeach his own witness, a defendant cannot avoid the hearsay rule by seeking to impeach himself.

In any event, the exclusion of these statements did not prejudice Peter's case. To the contrary, Peter's prior statements that he knew the location of the gun and that he walked 10 to 15 feet to get the gun during the argument actually supports the prosecution's premeditation theory that he understood what he was doing, that he had time to reflect on his acts, and that he intended to shoot his wife. There is no possibility the jury would have reached a more favorable verdict if they heard Peter's prior statements about the location of the gun.

II. *Limiting Instruction on Molest Accusation*

Peter contends the court erred in failing to give a limiting instruction on the limited use of Elaine's molest accusation. Specifically, Peter contends the court should have instructed the jury that: "There is no evidence whatsoever that Elaine's accusation against Mr. Garcia is true. This evidence is presented for a limited purpose—to show Mr. Garcia's state of mind and the topic of Mr. and Mrs. Garcia's argument. Elaine's

accusation may not be considered by you to prove that Mr. Garcia is a person of bad character or that he has a disposition to commit crimes.'"

Peter recognizes that counsel did not ask for such instruction, and thus contends defense counsel was ineffective for failing to request a limiting instruction and/or the court had a sua sponte duty to instruct the jury.

These arguments are without merit. There was no need for this instruction because it was clear at trial that the molest allegation evidence was relevant to show the reason Peter acted as he did. The prosecution did not call Elaine to testify, and made no attempt to argue or prove that Peter actually committed the offense more than 25 years earlier. Any reasonable juror would have understood that his or her task was to decide whether the molestation charge would have triggered a reasonable person to act rashly under the circumstances, and not to decide that Peter had a predisposition to commit the murder because it was true that he had committed the molestation. Although the jury may have considered the truth or falsity of the molest charge in assessing the reasonableness of Peter's reactions to the charge, no reasonable juror would have used this determination to then decide that Peter had a criminal disposition to murder his wife.

DISPOSITION

Judgment affirmed.

HALLER, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.